MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1229

RICHARD J. ISRAEL, *et al.*,

Petitioners,

—v.—

JANE DOE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Questions Presented

1. Whether the court below was correct in ruling that Rhode Island's amended abortion statute, R. I. General Laws §§11-3-1 through 11-3-5 is unconstitutional under the rulings of this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973)?

2. Whether the procedural rulings of the court below constituted a sound exercise of its judicial discretion and whether any possible alleged errors were in fact harmless?

Statement of the Case

Following the decisions of this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), the United States District Court for the District of Rhode Island declared unconstitutional the Rhode Island statute, R. I. General Laws §11-3-1 *et seq.*, which prohibited all abortions except those necessary to preserve the life of the mother. *Women of Rhode Island* v. *Israel*, C.A. No. 4605 (D.R.I. February 7, 1973); *Rhode Island Abortion Counseling Service* v. *Israel*, C.A. No. 4586 (D.R.I. February 7, 1973).

Thereafter, the Rhode Island legislature re-enacted the same statute adding only a declaration that a fetus, from the moment of conception, is "a person within the language and meaning of the Fourteenth Amendment to the Constitution of the United States." R. I. General Laws §11-3-1 *et seq.* (as amended, 1973). The new statute, like its unconstitutional predecessor, prohibits at every stage of pregnancy all abortions except those necessary to preserve the life of the woman.

As a result of this new impediment to obtaining a legal abortion in Rhode Island, plaintiffs, pregnant women seeking legal abortions in Rhode Island, initiated this action to challenge the constitutionality of the rewritten restrictive statute.

A motion to intervene or to appear as *amicus curiae* was made by the Constitutional Right to Life Committee. The Committee was then permitted to proceed throughout as though it was a party.

A second motion to intervene as *guardian ad litem* for fetuses was made by Anne Frank. That motion was denied. In denying Ms. Frank's motion the trial court noted that she was represented by the same counsel as the Constitutional Right to Life Committee.

Plaintiffs' motion for a preliminary injunction was denied by United States District Judge Raymond J. Pettine, on April 4, 1973.

On April 9, 1973, the trial court entered an Order which was consented to by counsel for plaintiffs and defendant whereby plaintiffs' request for injunctive relief was withdrawn in light of the agreement by the State that it would abide by any declaratory judgment issued by the Court. The order set the matter down for trial before Judge Pettine on April 12, 1973.

Following a full evidentiary hearing, Judge Pettine held the Rhode Island abortion statute unconstitutional on May 16, 1973.

On May 17, 1973, appellants filed Notice of Appeal and on May 22, 1973 applied to the United States Court of Appeals for the First Circuit, *ex parte,* for a temporary stay of the judgment below. That stay was granted on May 23, 1973 pending argument which was set for June 5, 1973. On June 6, 1973, following full argument, the Court of Appeals denied appellants' motion for a stay pending appeal and terminated the emergency stay previously granted.

Still two weeks later, and a full five weeks after the entry of final judgment by the District Court, Gary Brennan, *et al.,* applied to the District Court to intervene

on behalf of fathers and potential fathers of fetuses. On July 5, 1973, that motion was denied by the District Court.

On November 14, 1973, the Court of Appeals affirmed the judgment of the district court holding the Rhode Island statute unconstitutional under *Roe* v. *Wade, supra* and *Doe* v. *Bolton, supra.* It is that decision which is appealed from herein.

ARGUMENT

1. Both the Court of Appeals and the District Court were correct in holding that this case is controlled by *Roe* v. *Wade* and *Doe* v. *Bolton.*

The Rhode Island abortion statute challenged herein bars all abortions except those which are necessary to preserve the life of the pregnant woman. In holding that statute unconstitutional the District Court termed "frivolous" the effort of the Petitioners to distinguish the statute herein from that in *Roe* v. *Wade.* The Court of Appeals below concluded that Petitioners' substantive arguments "merely reiterate, reinforce or restate contentions unequivocally rejected by the [Supreme] Court." Petitioners' Appendix A, p. 91.

This Court set forth with painstaking care in *Roe* v. *Wade* the standards which were to be applied by courts and legislatures in determining whether a restrictive abortion statute is constitutional. Those standards were flatly ignored by the Rhode Island legislature. The statute herein, R. I. General Laws §11-3-1 *et seq.*, is nothing but the Texas statute declared invalid in *Roe* v. *Wade* with a preamble and declaration purporting to create a statutory

presumption that a fetus is a person from the moment of conception and as such is entitled to the protection of the Fourteenth Amendment. In re-enacting its prior unconstitutional statute, the Rhode Island legislature either ignored, or attempted to negate, the express ruling of this Court in *Roe* v. *Wade, supra,* that a fetus is not a "person" within the language and meaning of the Fourteenth Amendment. The Court below was correct in holding that Rhode Island cannot avoid the ruling of this Court merely by adopting as law a theory that life begins at the moment of conception. For as this Court stated in *Roe* v. *Wade*:

> "We do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." *Roe* v. *Wade, supra* at 731.

This case is plainly controlled by *Roe* and *Doe* as this Court demonstrated in its handling of a virtually identical case which arose in the neighboring state of Connecticut. There, after a three judge federal court struck down a restrictive abortion statute which had been amended by the addition of a preamble such as that herein, this Court summarily remanded the case for action consistent with *Roe* and *Doe,* and denied the State's petition for rehearing which raised the same constitutional arguments raised by Petitioners herein. *Markle* v. *Abele,* 93 S. Ct. 1439 (1973), rehearing denied 93 S. Ct. 1888 (1973).[1] On remand, the District Court reaffirmed its earlier finding of unconstitutionality. *Abele* v. *Markle,* Civ. No. B-521 (April 26, 1973).

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[1] *Abele,* like this case, developed when the Connecticut Legislature sought to evade the rulings of the federal court which had just held its Texas-type abortion statute unconstitutional, *Abele* v. *Markle,* 351 F. Supp. 224 (D. Conn., 1972), by amending the statute to add a preamble declaring that life begins at conception.

See also *Byrn* v. *New York City Health & Hospital Corp.*, 410 U.S. 949 (1973), in which this Court citing *Roe* v. *Wade, supra,* dismissed for want of a substantial question an appeal raising the same constitutional claims raised herein. More recently, on March 26, 1974, this Court denied *certiorari* in *Kugler* v. *Young Women's Christian Association of Princeton, New Jersey* (No. 73-838) where, as in this case, the Petitioners sought to have this Court reconsider its rulings in *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra.*

The challenged Rhode Island statute prohibits all abortions except those which are necessary to preserve the life of the pregnant woman. *Roe* v. *Wade, supra,* holds that such a statute is unconstitutional. Petitioners' substantive arguments in support of the statute have all been presented to and rejected by this Court in *Roe* and related cases such as *Markle, Byrn,* and *Kugler.* Therefore, the Petition for a Writ of Certiorari should be denied.

2. The procedural rulings complained of by Petitioners were not erroneous and any possible alleged error was harmless.

In a tacit acknowledgment of the lack of merit in their substantive constitutional claims, the Petitioners devote the bulk of their 68 page Petition to attacks on a variety of procedural rulings below. Respondents submit that the rulings challenged herein were well within the proper exercise of discretion of the District Court and, therefore, not erroneous. Moreover, even if any of such ruling was in error, the error was harmless and does not warrant this Court's consideration.

(a) *Standing and Ripeness of Issues*

Petitioners contend that a justiciable controversy was lacking because plaintiffs-respondents voluntarily obtained abortions outside of Rhode Island after commencement of this action but prior to final adjudication of the litigation.

In light of this Court's rulings in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973) Petitioners' contention is frivolous.[2] As the First Circuit said in rejecting Petitioners' arguments:

> Whatever justification defendants may believe they have for seeking to relitigate substantive matters, we can think of none for attacking the minor one of plaintiffs' standing, so fully considered in *Roe* v. *Wade*, ante, 410 U.S. at 125. Even if the question were open, the contention that plaintiffs should have to come to term in order to obtain a declaration of their right not to, seems reminiscent of the procedure under which persons wishing to avoid execution for witchcraft could establish their innocence by drowning. Petitioners' Appendix, p. 91.

Nor can any comfort be found by Petitioners in this Court's ruling in *Hodgson* v. *Randall*, 402 U.S. 967 (1971). First, that decision was rendered prior to *Roe* v. *Wade*, *supra*. Further, the decision in that case was addressed to the question of the standing of a doctor who had already

[2] Petitioners' argument borders on the bizarre for at the same time they contend that the plaintiff women have no standing, they also argue that it was error for the lower court to permit the action to proceed without the joinder as parties of many persons not directly affected by the challenged statutes including the husbands of the pregnant women of Rhode Island who do not desire abortions and men whose wives are not now pregnant but may at same future time become pregnant.

performed an abortion but who had not been indicted at the time suit was initiated. Thus the question before the Court was whether there was an immediate threat to the doctor's ability to exercise her constitutional rights. Finally, although not totally clear, it would appear from the lower Court's decision in that case, *Doe* v. *Randall*, 314 F. Supp. 32 (D. Minn. 1970) that plaintiff Doe terminated her pregnancy by an abortion performed in Minnesota prior to filing her federal action.

In contrast in the instant case, the plaintiffs were pregnant when this action began, and thereafter, because of the time consuming aspects of litigation, were forced to seek and obtain abortions outside of Rhode Island. Under such circumstances, this Court has held that the termination of a plaintiff's pregnancy does not terminate her standing to challenge State laws restricting her right to obtain a medically safe abortion in her home State. *Roe* v. *Wade*, *supra*. Accordingly, the trial court did not err in rejecting all challenges to the plaintiff's standing.

(b) *Class Action*

Petitioners assert that the trial court's designation of this action as a class action was erroneous because no notice was afforded the class.[3] If the trial court had erred in this respect, the error would clearly be harmless. Because of the nature of the relief sought by plaintiffs,

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[3] Petitioners also assert that notice should have been given to persons and classes of persons, not parties, who Petitioners contend have an interest in the litigation, to wit, fathers and fetal guardians. Their argument does not go to the question of the propriety of a class action, but is no more than a reiteration of their contention that the guardian *ad litem* and fathers were indispensable parties. See Pt. *(d)* and *(e) infra*.

whether or not the action was correctly certified as a class action, is not of great consequence. The effect of issuing a judgment declaring a statute *unconstitutional on its face* is precisely the same in either instance. Moore's Federal Practice, Vol. 3B, ¶23.40 (2d ed. 1973). In any event, under Rule 23 (b) (2) of the Federal Rules of Civil Procedure, notice to the class is not required, *Yaffee* v. *Powers,* 454 F.2d 1362 (1st Cir., 1972).

(c) *Necessity of a Three Judge Court*

The law is clear. A three judge court is not required when prior judicial rulings render insubstantial the constitutional claims or defenses asserted. *Bailey* v. *Patterson,* 369 U.S. 31 (1962), *Turner* v. *City of Memphis,* 369 U.S. 350 (1962). The District Court found that the decisions of this Court in *Roe* v. *Wade,* and *Doe* v. *Bolton,* made frivolous and fictitious any claim that the challenged statute, on its face, is not unconstitutional and thus determined that the case could be heard and determined by a single judge. Petitioners' App. pp. 78, 79. The Circuit Court summarily affirmed. Petitioners' App. pp. 90-92.

Moreover, even if the *Bailey* v. *Patterson* doctrine did not apply, there was no need to convene a three judge court because prior to trial the plaintiffs formally abandoned their request for injunctive relief and amended their complaint so as to seek only declaratory relief. See *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963); *Steffel* v. *Thompson,* —— U.S. —— (March 19, 1974).

Finally, since in this case the defendant Attorney General stipulated to the procedure adopted by the District Court and consented to the entry of the Order which assigned the matter for trial before a single District Court judge,

he is estopped from challenging such procedure on appeal.[4] As the Court of Appeals said:

> "It is, at best, singular for a defendant voluntarily to say that he will respect a judge's order, and then to turn around and say that by his agreeing to do this he has deprived the judge of the power to make the order" (Slip Opinion Motion for Stay Pending Appeal, p. 4, June 6, 1973).

(d) *Intervention of Present and Future Fathers*

Petitioners' argument that denial of a motion to intervene by certain alleged fathers and potential fathers was grave error requiring this Court's consideration is totally without merit. The motion to intervene in this action was not made until about June 28, 1973, approximately five weeks after the District Court had entered its final judgment. Indeed, at the time the application to intervene was submitted, Petitioners herein had already docketed their appeal, and the Court of Appeals had denied Petitioners' motion for a stay pending appeal.

It is elementary that once Petitioners' appeal was docketed, jurisdiction vested in the Court of Appeals, leaving the District Court without power to act in the case. Thus, the District Court's denial of the motion to intervene was not error. Both *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra,* were decided without the joinder or intervention of any fathers or potential fathers of fetuses. Accordingly, the Petitioners' assertion that such fathers are indispensable parties to this action, is without merit.

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[4] The Petitioner, Constitutional Right to Life Committee, is in no different a situation. One Petition has been submitted by the parties and throughout these proceedings the parties have jointly defended in this action.

(e) *Intervention of "Guardian ad Litem"*

Finally, no substantial question is raised by the District Court's denial of the motion to intervene made by Anne Frank as guardian *ad litem* of fetuses.

It is clear from this Court's prior rulings that Ms. Frank was not an indispensable party to the determination of plaintiffs' constitutional objections to Rhode Island's abortion statute. In the case of *Doe* v. *Bolton,* 319 F. Supp. 1048, 1055 (N.D. Ga. 1970), a similar motion to intervene was rejected, yet thereafter this Court proceeded to determine the constitutionality of the challenged statutes. Numerous decisions of this Court establish that a fetus does not have a legal personality which must be represented in a dispute between a pregnant woman seeking an abortion and the state which is preventing her from obtaining that abortion. *Roe* v. *Wade, supra; Ryan* v. *Klein,* 93 S. Ct. 2747 (1973).

No new circumstances in the present case warrant reconsideration of this question.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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